

1 **WILLKIE FARR & GALLAGHER LLP**  
2 BENEDICT Y. HUR (SBN: 224018)  
3 bhur@willkie.com  
4 SIMONA AGNOLUCCI (SBN: 246943)  
5 sagnolucci@willkie.com  
6 EDUARDO E. SANTACANA (SBN: 281668)  
7 esantacana@willkie.com  
8 LORI C. ARAKAKI (SBN: 315119)  
9 larakaki@willkie.com  
10 ARGEMIRA FLOREZ (SBN: 331153)  
11 aflorez@willkie.com

12 Attorneys for  
13 GOOGLE LLC

14  
15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO**

18 ANIBAL RODRIGUEZ, et al., individually and  
19 on behalf of all others similarly situated,

20 Plaintiffs,

21 vs.  
22 GOOGLE LLC,

23 Defendant.

24 Case No. 3:20-cv-04688-RS

25 **DEFENDANT GOOGLE LLC'S REPLY  
26 IN SUPPORT OF MOTION TO DISMISS  
27 SECOND AMENDED COMPLAINT  
28 PURSUANT TO FED. R. CIV. P. 12(B)(6),  
AND IN THE ALTERNATIVE, MOTION  
TO STRIKE PURSUANT TO FED. R. CIV.  
P. 12(F)**

29 Date: August 19, 2021  
30 Time: 1:30 p.m.  
31 Place: Courtroom 3 - 17<sup>th</sup> Floor

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

The Court should grant Google’s Motion to Dismiss and keep this case moving toward resolution of the one theory the Court found adequately pled: that Google Analytics (“GA”) for Firebase collected a user’s data even if that user had the Web & App Activity setting turned “off,” in contravention of Google’s relevant disclosures. Google will prove that theory lacks merit. But Plaintiffs’ attempt to triple the scope of discovery by adding the terms “AdMob” and “Cloud Messaging”—without any factual support—fails as a matter of law. Plaintiffs’ belated attempt to add a contract claim a year after filing their complaint should also fail. In addition to identifying no relevant contractual obligation, the Limitation on Liability clause would doom recovery for any actionable contract claim, anyway. Finally, Plaintiffs’ amendment to the factual description regarding how information is provided to Google—although subtle—is fatal to Plaintiffs’ CIPA section 631 claim, which requires simultaneous interception of a message while in transit. GA for Firebase doesn’t do that, and Plaintiffs do not (and cannot) allege a violation of section 631.

## II. ARGUMENT<sup>1</sup>

#### A. The SAC says nothing about AdMob and Cloud Messaging.

The Opposition assures this Court that Plaintiffs have jettisoned their “secret scripts” theory entirely. Opp. at 4 n.2, 24:18-20. But what Plaintiffs have actually done is substitute their “secret scripts” theory with the names of two new Google products, without any notice of how these products fit into Plaintiffs’ claims, in an effort to expand discovery beyond its proper scope.

Plaintiffs say their AdMob and Cloud Messaging theories are mere “clarifica[tions] [of] the scope of the relevant Google technologies.” Opp. at 2:6-7. But the Court never invited such a clarification. This Court permitted Plaintiffs’ claims against GA for Firebase to proceed because what are now paragraphs 49–57 of the SAC provided factual allegations concerning the accused functionality, with citations to public documentation about that product. And the Court dismissed

<sup>1</sup> Unless otherwise noted, emphases are added and all internal quotation marks and citations have been omitted from case quotations.

1 the “secret scripts” theory because no such detail was provided. Plaintiffs apparently believe that all  
 2 they had to do to overcome their failed “secret scripts” theory was substitute the words “AdMob”  
 3 and “Cloud Messaging.” *See* ECF No. 112-5 [FAC-SAC Redline] ¶ 58; SAC ¶ 58. But the SAC still  
 4 alleges that AdMob and Cloud Messaging “scripts are *hidden* from users and run *without any*  
 5 *notice*,” SAC ¶ 58, and that they “*surreptitiously* copy and provide Google with app activity data,”  
 6 *id.* ¶ 6, without any explanation of what is “secret,” “hidden” or “surreptitiously” copied by these  
 7 products. This Court should not countenance Plaintiffs’ effort to triple the scope of discovery under  
 8 the guise of “clarification”—especially where they had no claims to save by clarification in the first  
 9 place. This plainly fails to meet the pleading requirements of Rule 9(b).

10 Even under Rule 8, Plaintiffs’ passing references to AdMob and Cloud Messaging fall far  
 11 short. *See* Mot. at 7–8. Plaintiffs’ Opposition does not deny that the SAC contains *zero* factual  
 12 allegations about these products. Plaintiffs direct this Court to their allegation that “Google . . .  
 13 collects data from users who turn off the [WAA] feature . . . [through] AdMob and Cloud Messaging  
 14 for Firebase.” Opp. at 23 (quoting SAC ¶ 6). That is a textbook “unadorned, the-defendant-  
 15 unlawfully-harmed-me accusation” that cannot survive a motion to dismiss because it fails to  
 16 explain *how* or *why* AdMob and Cloud Messaging improperly collect data, or how they are  
 17 substantively related to *any* of Plaintiffs’ claims. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

18 The Opposition relies heavily on documents outside the pleadings, underscoring their  
 19 absence in the SAC itself. And even if Plaintiffs’ quoted documents *were* included in the SAC, that  
 20 still wouldn’t cut it. Plaintiffs argue that AdMob and Cloud Messaging are “integrated” with GA  
 21 for Firebase and that AdMob “share[s] a core library dependency” with GA for Firebase. Opp. at  
 22 23–24. That these products are “integrated” with GA for Firebase could mean anything, or nothing.  
 23 Those statements do not reveal to Google—or this Court—*how* AdMob and Cloud Messaging are  
 24 related to Plaintiffs’ claims of violation of privacy, or what aspect of what they do is purportedly  
 25 unlawful. The fact that Google’s AdMob and Cloud Messaging products can be integrated into other  
 26 products and can interact with one another does not equate to data collection, let alone improper  
 27 data collection. The SAC’s “naked assertions” concerning AdMob and Cloud Messaging are  
 28 “devoid of[the] factual enhancement” that could push their claims “across the line from conceivable

1 to plausible,” *Ashcroft*, 556 U.S. at 678, 680, and the Court should dismiss them from the case.<sup>2</sup>

2 **B. The Opposition fails to save the breach of contract claim.**

3 Plaintiffs have not alleged a cognizable breach of contract claim based on Google’s Terms  
 4 of Service, Privacy Policy, WAA Help Center page language, or an implied obligation. Mot. at 9–  
 5 17. Plaintiffs concede at the outset that Google did not breach a promise in the Terms of Service.  
 6 *See* Opp. at 10:12–16. Notably, Plaintiffs also narrow the time period during which they contend  
 7 Google could have breached promises in the Privacy Policy to the period between August 19, 2015  
 8 and March 31, 2020; the Opposition makes no attempt to assert that Plaintiffs can base a breach of  
 9 contract claim on the Privacy Policy for alleged conduct after that.<sup>3</sup> *See* Opp. at 10 (Google’s Terms  
 10 of Service only incorporates the Privacy Policy “through . . . March 31, 2020”). They cannot argue  
 11 otherwise: the Terms of Service in effect as of March 31, 2020 states that the Privacy Policy “[is]  
 12 not part of these terms.” Santacana Decl., Ex. 1 at 1. And Plaintiffs abandon the theory that the  
 13 Privacy Policy is a separate stand-alone contract. *See* Opp. at 11:11–12 (relying only on  
 14 incorporation into Terms of Service).

15 **1. Plaintiffs haven’t identified an enforceable provision of the Privacy Policy.**

16 Unable to rely on any statements in the post-March 2020 Privacy Policy, Plaintiffs redouble  
 17 their reliance on three informational statements in Google’s Privacy Policies effective between May  
 18 25, 2018, and March 30, 2020.<sup>4</sup> Those three statements are:

19  
 20 <sup>2</sup> Plaintiffs alternatively suggest that their allegations should be allowed to stand because the Court  
 21 accepted “the FAC’s parallel allegations concerning Google Analytics” which “mirror” their new  
 22 allegations. Opp. at 23, 24. But paragraphs 49–57 obviously don’t apply to AdMob and Cloud  
 23 Messaging, which are concededly different products or features, and the SAC contains no other  
 24 allegations on which the Court could have made or could now make such a conclusion.

25 <sup>3</sup> Google hasn’t reversed its position. Google argued that the *specific* representations Plaintiffs  
 26 identify here are not themselves enforceable promises, even if other aspects of the Privacy Policy  
 27 are. *See* Mot. at 9–10. Indeed, Google accepted for purposes of its Motion that the Privacy Policy  
 28 was incorporated into the Terms of Service before March 30, 2020. But, Google argued, the  
 limitation of liability section precludes recovery for violations of the Policy during that time. *See*  
 Mot. at 18–19. There is no daylight between that and Google’s position in other cases. *Cf.* Opp. at  
 9–10 (discussing Google’s positions in other cases).

29 <sup>4</sup> Plaintiffs also identify statements in the Privacy Policy effective between August 19, 2015 and  
 30 May 24, 2018 as “contain[ing] similar promises” (Opp. at 11 n.7 (citing SAC ¶ 68 & n.20)), but  
 31 none of those representations are enforceable because they are even less promissory in nature. Even

- 1     • “[A]cross our services, you can adjust your privacy settings to control what we  
2     collect and how your information is used.”
- 3     • “Our services include . . . [p]roducts that are integrated into third-party apps  
4     and sites, like ads . . .”
- 5     • “My Activity allows you to review and control data that’s created when you use  
6     Google services . . . Go to My Activity.”

Opp. at 11:14–17. None of Plaintiffs’ arguments render these statements enforceable promises.

First, the Opposition focuses on the wrong question entirely, advancing arguments about how these statements should be *interpreted*, claiming the Court has already ruled on that question because of its ruling concerning Google’s consent defense. Opp. at 11–12. But the key question—whether the alleged promises are enforceable in the first place—is virtually overlooked by the Opposition. That separate prerequisite to a breach of contract claim is not met here.

For example, Plaintiffs fail to address how the promise they identify as the key one—that “My Activity allows you to review and control data that’s created when you use Google services” (Opp. at 12:11–17 & n.8)—is any different than the representation the court in *In re Google Location History Litigation* found unenforceable because it “merely provides information—not commitments.” *See* Opp. at 12 & n.8. That case concerned Google’s representation that users “can adjust [their] privacy settings to control what [data] [Google] collect[s].” No. 5:18-CV-05062-EJD, 2021 WL 519380, at \*9 (N.D. Cal. Jan. 25, 2021). The representation at issue here is exactly the same, except it concerns a different setting (WAA instead of general “privacy settings”) that users can adjust “to review and control data that’s created.” Opp. at 11:16–17.

Plaintiffs’ attack on *Block v. eBay, Inc.*, 747 F.3d 1135 (9th Cir. 2014), is equally ineffectual. Opp. at 13. Not every provision in a contract is enforceable. *See id.* at 1138–40. To tell the difference, the Ninth Circuit advises courts to compare the specific representations at issue against others within the contract to determine whether the identified language is enforceable. In *Block*, the court compared statements communicating enforceable promises “by the user (e.g., “While using eBay sites, services and tools, *you will* not . . . violate any laws. . . .”), and by eBay (e.g., “If we resolve a dispute in the buyer’s favor, *we will* refund the buyer for the full cost of the item. . . .”),”

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more than the statements on which Plaintiffs base their claim, the earlier statements simply explain what users can do, but do not commit Google to offering any specific function.

1 with ones that were merely “explanatory” because they explain how eBay functions (e.g., “our sites  
 2 are venues to allow anyone to offer, sell, and buy just about anything”; “We are not involved in the  
 3 actual transaction . . . ”). *Id.* at 1139. The explanation in the Privacy Policy of what users can expect  
 4 with respect to My Activity cannot be distinguished from the unenforceable statements in *Block*.

5 Plaintiffs attempt to distinguish the Ninth Circuit’s ruling in *Block* by arguing the alleged  
 6 promises at issue there are different because they “attempt to distance” the defendant from liability  
 7 whereas the representations here allegedly identify a “promise[] to honor users’ choice[].” Opp. at  
 8 13. Nothing in *Block* supports that. Determining whether a representation is enforceable doesn’t  
 9 turn on the *type* of promise; it turns on whether the representation is written in “promissory,” rather  
 10 than informative, “*language*,” irrespective of subject matter. *See Block*, 747 F.3d at 1138, 1139.

11 Plaintiffs run from another Ninth Circuit case, *In re Facebook, Inc. Internet Tracking Litig.*,  
 12 956 F.3d 589 (9th Cir. 2020), by ignoring parts of the opinion. The Ninth Circuit found that an  
 13 exchange of promises committing Facebook to “‘provide . . . tools’” and committing users “*not to*  
 14 ‘send or otherwise post unauthorized . . . communications’” was enforceable, while the  
 15 representation in a Facebook Data Use Policy that “[y]our information is the information that’s  
 16 required when you sign up for the site” was merely informational. *Id.* at 610–11. Plaintiffs argue  
 17 that the court concluded the Privacy Policy “was not incorporated into Facebook’s SRR.” Opp. at  
 18 13. But Plaintiffs ignore that the Ninth Circuit also analyzed the alternative argument that statements  
 19 in the data use policy were “*separate*” enforceable commitments—and it is within that analysis that  
 20 the court articulated the difference between information and commitments. 956 F.3d at 610–11.<sup>5</sup>

21 Finally, Plaintiffs invoke the decision in *Calhoun v. Google LLC*, Case No. 20-CV-05146-  
 22 LH, 2021 WL 1056532 (N.D. Cal. Mar. 17, 2021), but that ruling doesn’t alter the analysis here  
 23

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24 <sup>5</sup> See also *Flores v. United Parcel Serv., Inc.*, 768 F. App’x 677, 679 (9th Cir. 2019) (affirming  
 25 dismissal of contract claim because representation that UPS would ship packages “via ‘Next Day  
 26 Air’” “cannot plausibly be read to constitute an enforceable promise in light of other provisions that  
 27 do contain promissory language”); *accord Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*,  
 938 F.3d 113, 127 (4th Cir. 2019) (comparing the informative quality of the “Nature of the Service”  
 clause (i.e., devices “are” and “are not” intended for certain uses) that makes it “descripti[ve]” as  
 compared to “other provisions in the contract [that] impose obligations” (e.g., “[y]ou cannot”)).

1 because the *Calhoun* court only considered whether the Privacy Policy *as a whole* “ma[de] 2 commitments;” it did not engage in the analysis from *Block* of whether specific statements were 3 informational or enforceable. *Id.* at \*19. Google does not dispute that the Privacy Policy in effect 4 before March 30, 2020 contains *some* commitments. The statements Plaintiffs identify, however, do 5 not. Plaintiffs’ remaining cases are equally inapt because those courts *assumed* the enforceability of 6 the promises at issue, and considered only the separate elements of breach and harm.<sup>6</sup>

7 Plaintiffs claim the three statements in the Privacy Policy are enforceable because “a 8 reasonable user could interpret these provisions to promise that My Activity (WAA) can be used to 9 control data that Google collects through Google’s services.” Opp. at 11–12. Plaintiffs’ argument 10 goes like this: this Court determined—in the context of Google’s consent-defense analysis—that 11 Google’s reference to “services” in its Privacy Policy “permits [a user to] infer[] that GA for 12 Firebase is a ‘Google service,’” and because “‘Go to My Activity’ . . . in the third bullet point 13 [above] contains a hyperlink . . . to the WAA control,” that means both parties came to an 14 (enforceable) meeting of the minds as to how WAA functions vis-à-vis GA for Firebase. *See id.*

15 As discussed, this argument focuses on the wrong question. It is focused on interpretation, 16 not enforceability. Even if the statements are susceptible to Plaintiffs’ reading (as this Court already 17 found), that does not mean they constitute enforceable promises. Plaintiffs’ argument is thus 18 premised on a false equivalency. Plaintiffs equate—without any basis—what one party to the 19 alleged contract (the user) might believe, to what both parties (the user and Google) have actually 20 agreed to. This Court’s interpretation of a user’s potential understanding cannot bear such weight; 21 at most, it gets Plaintiffs half way. *E.g., Aisenman v. City & Cty. of San Francisco*, No. C 03-4557 22 MJJ, 2005 WL 43497, at \*3 (N.D. Cal. Jan. 6, 2005) (meeting of the minds on all material points is 23 essential to contract formation). Indeed, even if users believed they were not “consent[ing] to 24 Google collecting their data, through GA for Firebase, with WAA turned ‘off’” that is not the same

25  
26 <sup>6</sup> See *In re Google Assistant Priv. Litig.*, No. 19-CV-04286-BLF, 2021 WL 2711747, at \*10–12 27 (N.D. Cal. July 1, 2021) (assessing breach); *McCoy v. Alphabet, Inc.*, No. 20-CV-05427-SVK, 2021 28 WL 405816, at \*12 (N.D. Cal. Feb. 2, 2021) (assessing breach and harm); *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 801 (N.D. Cal. 2019) (assessing breach).

1 as an obligation that Google ensure WAA is coded to work a certain way. ECF No. 109 at 7. A party  
 2 can fail to have a consent defense without having entered into a contract; after all, unilateral  
 3 understanding is not the same as mutual obligation.

4 An analysis of the plain language of the Privacy Policy reveals that Google—for its part—  
 5 could only have intended the statements to be explanatory, regardless of what Plaintiffs did or did  
 6 not think. *See* Mot. at 11–13; *supra* at 3–5. Google knew how to use and could have used promissory  
 7 language in those bullet points, but it didn’t. As a matter of law, it is unreasonable to conclude that  
 8 Google nevertheless intended these statements to be enforceable.

9 Because Plaintiffs haven’t identified an enforceable promise, and Plaintiffs’ remaining cases  
 10 are inapposite.<sup>7</sup> Their breach of contract claim thus fails at the first step.

11 **2. Plaintiffs fail to identify a breach of the Privacy Policy.**

12 Even assuming Plaintiffs identified an enforceable promise, they fail to alleged a breach of  
 13 the promise that “My Activity allows you to review and control data that’s created when you use  
 14 Google services.” Mot. at 13–14. Plaintiffs argue that Google breached the Privacy Policy since the  
 15 WAA feature does not “stop[] Google from collecting [app-activity] data.” Opp. at 14:20–22. But  
 16 Plaintiffs do not dispute that Google does have a WAA control and that it does allow users to review  
 17 and control data created when they use Google services. Their allegations would require a far more  
 18 specific promise—that the WAA control could affect the flow of data made available to third-party  
 19 businesses through GA for Firebase—akin to the promise the Ninth Circuit found missing in *In re*  
 20 *Facebook, Inc. Internet Tracking Litig.* (affirming dismissal of contract claim because privacy  
 21 policy “does not contain any agreement that Facebook would not track logged-out user data”).  
 22 While this Court has held that Plaintiffs did not necessarily *consent* to GA for Firebase’s ordinary  
 23 functioning when WAA is turned off, that is not the same as holding that Google was contractually  
 24

25  
 26 <sup>7</sup> *See Rodman v. Safeway, Inc.*, No. C 11-03003 JSW, 2011 WL 5241113, at \*3 (N.D. Cal. Nov. 1,  
 27 2011) (assuming, without deciding, that promise was enforceable). Plaintiffs’ remaining case is  
 28 further afield; it merely provides a general rule statement and wasn’t decided at the pleadings stage.  
*See Williams v. Apple, Inc.*, No. 19-CV-04700-LHK, 2021 WL 2186223, at \*5 (N.D. Cal. May 28,  
 2021).

1 bound to offer specific functionality to prevent it from doing so.

2 **3. The Help Center language is not enforceable.**

3 The Oppositions' argument that the Help Center page is enforceable is like arguing that the  
 4 description of particular features in the product manual for a toaster forms a binding contract.  
 5 Plaintiffs cite no authority to support such a far-fetched application of contract law.

6 **First**, Plaintiffs cannot allege they provided consideration for the WAA Help page. *Id.* at 14.  
 7 Plaintiffs argue that Google's receipt of a benefit constitutes adequate consideration because:  
 8 (1) "Google . . . gained and retained users" and (2) "accrued goodwill by claiming that it was . . .  
 9 respecting users' privacy choices." Opp. at 15–16. Neither theory identifies a benefit that was  
 10 "actually [] bargained for as the exchange for the promise." *Id.* at 16. Google did not bargain to gain  
 11 and retain users in exchange for alleged promises in the WAA Help page. Like a product manual,  
 12 that page is "gratuitous in the sense of being offered without expectation of any exchanged promise."  
 13 *Jara v. Suprema Meats, Inc.*, 121 Cal. App. 4th 1238, 1251 (2004). Plaintiffs and other users are  
 14 free to use or not use third-party apps. Indeed, Plaintiffs admit that "the Terms of Service did not  
 15 obligate Plaintiffs to interact with apps that use Google services." Opp. at 15:19–20. The WAA Help  
 16 page is no different. Nothing in it forces Plaintiffs "to perform any act in exchange for [Google's]  
 17 performance," and Plaintiffs do not claim otherwise. *Aguilera v. Bigham*, No. 2:15-CV-1781-KJM-  
 18 EFB, 2016 WL 4540834, at \*4 (E.D. Cal. Aug. 30, 2016). Nor did Google bargain with Plaintiffs  
 19 to obtain "goodwill." As Plaintiffs admit, the purported goodwill comes from the act of publishing  
 20 the WAA page, and that act is independent of and uncontrolled by Plaintiffs' actions.

21 **Second**, the WAA Help Center page is not incorporated by reference into the Terms of  
 22 Service. Plaintiffs' web-linking argument is predicated, as it must be, on whether the underlying  
 23 statement containing the link is promissory in nature.<sup>8</sup> Here, the fact that the link itself says "You  
 24 **can learn** more here" indicates what is behind the link is informational, rather than promissory. So,  
 25 even if the Privacy Policy and WAA Help page were read together, the WAA Help page would not

26  
 27 <sup>8</sup> To be clear, as Plaintiffs admit, their web-linking theory only applies between May 25, 2018 and  
 28 March 30, 2020, which is the time period in which the Terms of Service incorporated the Privacy  
 Policy and the Privacy Policy linked to the WAA page.

1 be viewed as containing enforceable promises. *See* Mot. at 11–13; *supra* at 3–6.

2 **Finally**, Plaintiffs abandoned the argument that the Android Google Account help  
 3 statements are incorporated by reference into a valid contract. Indeed, they make no effort to allege  
 4 that either the Terms of Service or the Privacy Policy adequately “guide[] a reader” to the “settings  
 5 menu of Android devices.” Opp. at 15:1–3; *see Facebook Internet Tracking*, 956 F.3d at 610–11.  
 6 And because the alleged promises are the “same” as those that appear in the WAA Help Center  
 7 page, SAC ¶¶ 240–42, Plaintiffs’ contention that they are stand-alone express or implied contracts  
 8 fails for the same reasons that argument fails with respect to the WAA Help page.

9 **4. The implied contract theory is foreclosed as a matter of law.**

10 Plaintiffs now argue that the previously-unspecified “communications” which formed the  
 11 basis of their implied contract claim arise from a “deal that Google proposed in the WAA [Help  
 12 Center page].” Opp. at 16–17. Putting aside that the Court must ignore allegations outside the  
 13 complaint (*see* Mot. at 9 n.8)—that still does not establish a contract. Plaintiffs contend the WAA  
 14 Help page offered a “deal” where “users [would] continue interacting with apps that use certain  
 15 Google services so long as Google agrees not to collect their data.” Opp. at 16–17. The WAA Help  
 16 page contains no such promise. According to the SAC, the WAA Help page identifies “What’s  
 17 saved as Web & App Activity” and states that “To let Google save this information: Web & App  
 18 Activity must be on.” SAC ¶¶ 71, 74, 240; *see also* Opp. at 14–15. That contains no offer on  
 19 Google’s part to do anything in particular—let alone refrain from receiving user data—in exchange  
 20 for conduct by Plaintiffs.

21 Further, Plaintiffs have no cogent response to Google’s argument that the implied contract  
 22 claim cannot be distinguished from the express contract claim. Mot. at 16–17 (citing *Mountain View*  
*23 Surgical Ctr. v. Cigna Health Corp.*, No. CV 13-08083 DDP (AGR), 2015 WL 5456592, at \*2  
 24 (C.D. Cal. Sept. 17, 2015)). Plaintiffs contend Google “cannot have it both ways” by arguing “that  
 25 the Terms of Service and Privacy Policy do not make any enforceable commitments about WAA.”  
 26 Opp. at 17:10–18. But Google argued only that the particular language in the Privacy Policy  
 27 identified by Plaintiffs does not constitute an enforceable promise. As for the Terms of Service,  
 28 Google argued they *do* constitute an “enforceable express contract” “cover[ing] the same subject

1 matter” (Plaintiffs’ use of Google’s services, including WAA) as the alleged implied contract.<sup>9</sup> Mot.  
 2 at 16–17. As in *Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 WL 5568706, at \*5 (N.D.  
 3 Cal. Oct. 9, 2013), Plaintiffs cannot maintain an implied contract claim where the Terms of Service  
 4 and alleged implied contract both cover use of WAA, which is the same “subject matter.”

5 And while Plaintiffs accurately recite that Rule 8 allows pleading in the alternative, they  
 6 omit a critical detail: the pleading must be based on “a reasonable belief that each of the theories  
 7 pleaded is legally tenable.” *Malibu Behav. Health Servs. Inc. v. Magellan Healthcare, Inc.*, No.  
 8 2:20-CV-01731 ODW (PVCx), 2020 WL 7646974, at \*5 n.7 (C.D. Cal. Dec. 23, 2020). That cannot  
 9 be true here. Any assertion that Google made implied-in-fact promises about the function of WAA  
 10 is foreclosed by the explicit disclaimers in Google’s Terms of Service: “Other than as expressly set  
 11 out in these Terms [of Service] or additional Terms, . . . Google [does not] . . . make any specific  
 12 promises about the services. For example, ***we don’t make any commitments about . . . the specific***  
 13 ***functions of the services.***” Santacana Decl., Ex. 2 at 5 (Terms of Service effective October 25, 2017  
 14 to March 31, 2020); *id.*, Ex. 3 at 5 (same for Terms of Service effective April 14, 2014 to October  
 15 25, 2017).<sup>10</sup> Plaintiffs lack a reasonable, alternative basis on which to ground their implied contract  
 16 claim. *See O’Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 1001 (N.D. Cal. 2014) (granting  
 17 judgment on the pleadings because “the purported implied contract encompasses the same subject  
 18 (Uber’s advertising) and requires a result contrary to that required by the Terms and Conditions of  
 19 the express contract—a result not allowed by California law of contracts”).

20 **C. Plaintiffs’ request for non-restitutionary disgorgement and consequential  
 21 damages for their breach of contract claim is foreclosed as a matter of law.**

22 Plaintiffs’ request for non-restitutionary disgorgement and consequential damages for their  
 23

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24 <sup>9</sup> This case is therefore unlike *Hickcox-Huffman v. US Airways, Inc.*, No. 10-CV-05193-HRL, 2017  
 25 WL 4842021, at \*5–6 (N.D. Cal. Oct. 26, 2017), where the defendant argued that the *same* document  
 26 was and was not a contract.

27 <sup>10</sup> This disclaimer is also contained in the Terms of Service effective as of March 31, 2020. *See*  
 28 Santacana Decl., Ex. 1 at 11 (“The only commitments we make about our services (including . . . the  
 specific functions of our services . . .) are (1) described in the Warranty section [of the Terms of  
 Service], (2) stated in the service-specific additional terms [which do not exist for WAA], or (3)  
 provided under applicable laws. We don’t make any other commitments about our services.”).

1 breach of contract claim is precluded by the limitation of liability in the Terms of Service.<sup>11</sup> Mot.  
 2 at 22–24. The Oppositions’ arguments to the contrary are specious. First, Plaintiffs argue the second  
 3 clause in the Limitation of Liability section does not apply to their use of Google services because  
 4 it is limited to users who pay Google for services. *See* Opp. at 21–22. That confuses applicability  
 5 with result. Nothing in the second clause limits who the clause *applies* to. Mot. at 23. The clause  
 6 limits the *result* of a lawsuit, for users in all cases, to recovering no more than what they paid.  
 7 What’s more, Plaintiffs’ surplusage argument crumbles under textual scrutiny. The first clause  
 8 specifies that certain types of damage are not recoverable; the second specifies that any recoverable  
 9 damages are capped; the third limits damages to those that are reasonably foreseeable. *Id.* None of  
 10 these overlap, even if they all apply to users who did not pay for services. And Plaintiffs’ argument  
 11 that Google could have drafted the clause more clearly cannot vitiate its effect. *See* Opp. at 22 n.15.

12 Plaintiffs’ only other argument for why the Court should disregard the Limitation of Liability  
 13 clause is a half-hearted footnote claiming the clause is unconscionable. *See* Opp. at 22 n.16. That  
 14 argument is baseless. Plaintiffs failed to plead facts establishing either procedural or substantive  
 15 unconscionability. For example, Plaintiffs haven’t alleged surprise; to the contrary, Plaintiffs  
 16 purport to be sophisticated users concerned about and familiar with Google’s privacy policies. And  
 17 even if they did not see the Limitation of Liability, it is enforceable nonetheless. *Adkins v. Facebook,*  
 18 *Inc.*, No. C 18-05982 WHA, 2019 WL 3767455, at \*3 (N.D. Cal. Aug. 9, 2019). The clause is “in  
 19 its own section, clearly labeled” and printed in all caps. *Kilgore v. KeyBank, Nat. Ass’n*, 718 F.3d  
 20 1052, 1059 (9th Cir. 2013). Nor have Plaintiffs alleged there were no alternatives to using Google’s  
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22 <sup>11</sup> When damages are precluded as a matter of law, they can be disposed of on a Rule 12(b)(6)  
 23 motion to dismiss. *Alberts v. Liberty Life Assurance Co. of Bos.*, No. C 14-01587 RS, 2014 WL  
 24 2465121, at \*4 & n.4 (N.D. Cal. June 2, 2014) (dismissing claim for punitive damages). Some courts  
 25 strike damages that are unavailable as a matter of law under Rule 12(f). E.g., *Levinson v. Transunion*  
 26 *LLC*, No. CV 16-00837, 2016 WL 3135642, at \*7 (C.D. Cal. June 2, 2016) (striking claim for “pain  
 27 and suffering” damages); *Dewi v. Wells Fargo Bank*, No. CV 12-2891, 2012 WL 10423239, at \*9  
 28 (C.D. Cal. Aug. 8, 2012) (same). Where courts believe damages cannot be stricken, they do not  
 hesitate to dismiss under Rule 12(b)(6) instead in the interest of judicial economy. *See, e.g.*,  
*Mayssami Diamond, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 3:20-CV-01230, 2021 WL 1226447,  
 at \*6 (S.D. Cal. Mar. 30, 2021) (collecting cases converting Rule 12(f) motions to Rule 12(b)(6)  
 motions to dismiss).

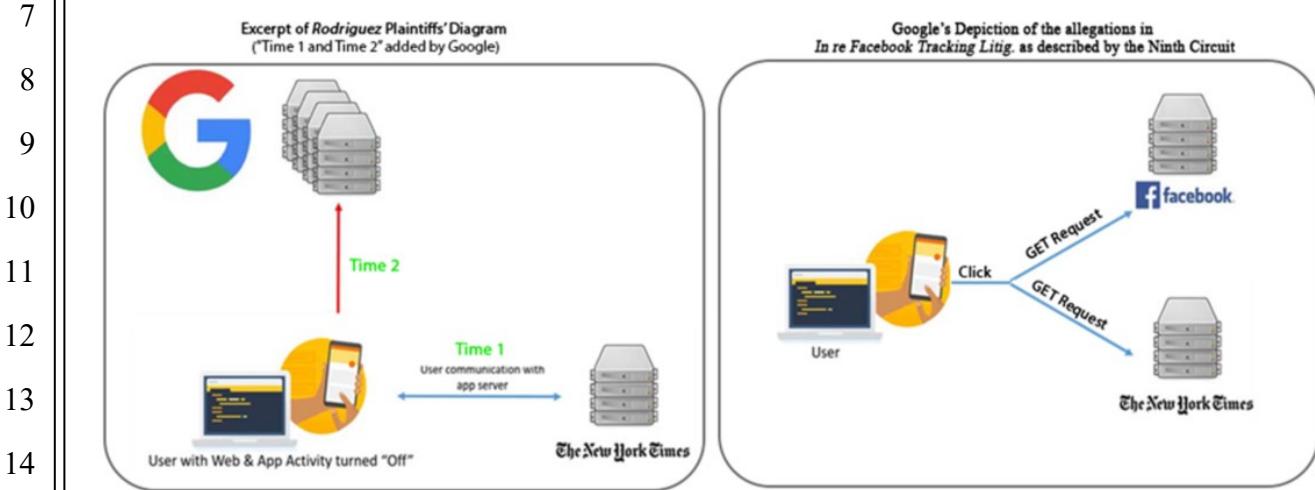
1 services such that the clause was oppressive. It is not sufficient that Plaintiffs may hold the  
 2 subjective belief “it would be far more difficult to navigate today’s world without a Google account”  
 3 (Opp. at 22 n.16), where they haven’t alleged they had no “meaningful choice” but to use Google’s  
 4 services. *See, e.g., Darnaa, LLC v. Google, Inc.*, No. 15-CV-03221-RMW, 2015 WL 7753406, at  
 5 \*2 (N.D. Cal. Dec. 2, 2015) (“procedural unconscionability [is] slight” in an agreement governing  
 6 use of YouTube “as plaintiff does not lack meaningful choice,” even though “YouTube ‘has  
 7 emerged as the dominant, outcome-determinative website’ for displaying music videos”). Finally,  
 8 Plaintiffs cannot allege substantive unconscionability, since Google provides its services to  
 9 Plaintiffs for free. *See Lewis v. YouTube, LLC*, 244 Cal. App. 4th 118, 125 (2015) (limitation of  
 10 liability clauses are particularly “appropriate when one party is offering a service for free”); *Murphy*  
 11 *v. Twitter, Inc.*, 60 Cal. App. 5th 12, 36 (2021) (“Courts have . . . recognized service providers that  
 12 offer free services to Internet users may have a legitimate commercial need to limit their liability  
 13 and have rejected claims that such limitations are so one-sided as to be substantively  
 14 unconscionable.”).

15 **D. Plaintiffs’ section 631 claim should be dismissed.**

16 Google expects that Plaintiff will ultimately fail to prove its CIPA 631 claim because user  
 17 consent is fatal to all of Plaintiffs’ claims. But the SAC demonstrates that Plaintiffs’ CIPA claim  
 18 fails now for a second, technical reason made plain by Plaintiffs’ subtle change to its description of  
 19 how and from where Google receives the data at issue—from the user’s “device” rather than from  
 20 the “app.” SAC ¶ 46. Plaintiffs now allege that Google saved a copy of data it recorded for app  
 21 developers ***after it had been transmitted to the user***, and ***then*** transmitted to Google for the app  
 22 developers’ purposes, all because Google used it for its own purposes, too. While Plaintiffs’  
 23 Opposition seeks to distance them from their amendments, they now concede—as they must—“that  
 24 an app cannot communicate with an app server without going through the mobile device.” Opp. at  
 25 5:23, 6:19–20. Because Plaintiffs do not and cannot allege that the app sent two simultaneous and  
 26 identical messages—one to Google and one to the user—the claim must fail.

27 Indeed, Plaintiffs’ created-for-litigation diagram on page 6 of the Opposition supports  
 28 Google’s argument. It shows two *separate* and *non-simultaneous* processes: a blue arrow

1 representing a completed communication between the New York Times and a red arrow  
 2 representing a separate duplication and transmission of information to Google. Nothing about the  
 3 diagram suggests simultaneity. In contrast, if the same diagram were used to depict the facts in  
 4 *Facebook Internet Tracking Litigation*, then the arrows would be conjoined at one end, because  
 5 unlike here, in that case Facebook's code caused a single user interaction to send *two* simultaneous  
 6 and identical GET requests—one to the intended recipient and the other to Facebook:



15 The “technical context” that led the Court to find an adequately alleged violation in that case  
 16 dictates the opposite result here. Indeed, Plaintiffs’ other diagram is even more problematic. Seeking  
 17 to amend Google’s depiction of how the alleged communication flows, Plaintiffs strike through the  
 18 entire communication, arguing that the data flow goes only from “User Device” to “Duplication” to  
 19 “Google.” Opp. at 5. That misses the point entirely, as the duplication and subsequent transmission  
 20 is what dooms the section 631 claim. But it also raises the question of what, specifically, qualifies  
 21 as the statutory “communication.” The SAC alleges that the communication constitutes the  
 22 interaction between the user’s app and the app developer’s server, SAC ¶ 49, and so does the  
 23 diagram on page 6 (depicted by the blue arrow and the box labeled New York Times), but the  
 24 Opposition inexplicably strikes through that portion of the data flow. By striking it out in an effort  
 25 to avoid dismissal on one ground, Plaintiffs walk into a second ground for dismissal. Without the  
 26 involvement of the app developer’s server, there can be no communication, and the CIPA claim  
 27 would fail for this independent reason.

28 In any case, Plaintiffs’ only legal argument against dismissal is that Google raises a factual

1 dispute that is not ripe at the pleading stage. That's wrong; just as in the raft of cases Google cited  
 2 where Plaintiffs were *required* to plead the technical facts underlying their claim of interception,  
 3 the Court here should hold Plaintiffs to that reasonable standard, and Plaintiffs have fallen short of  
 4 it. *See* Mot. at 19-21 (citing cases). If simply pleading the ultimate facts of violation were enough,  
 5 the Ninth Circuit would not have needed to engage in detailed technical analysis to determine that  
 6 some interception claims must be dismissed while others can survive. *Compare Konop v. Hawaiian*  
 7 *Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002) (detailing technical aspects of secure websites) *with*  
 8 *Facebook*, 956 F.3d at 607 (detailing GET requests). And any plaintiff could allege there is unseen  
 9 code in virtually any program or app that constitutes an interception without further explanation,  
 10 subjecting any technology provider to expensive and intrusive discovery.

11 What's more, the Opposition doesn't even describe what facts Plaintiffs could or would add  
 12 to their allegations that would give rise to the inference they seek, other than adding the word  
 13 "simultaneous." This is especially important in light of the Opposition's striking explanation for  
 14 why Plaintiffs don't re-assert their "secret scripts" theory after promising they could amend it with  
 15 additional facts, including from expert investigation: footnote 2 claims the parties' dispute over  
 16 "secret scripts" was merely a misunderstanding born from poor word choice. Plaintiffs claim they  
 17 only meant to assert a theory based on the publicly documented functionality of GA for Firebase,  
 18 which they said was "secret" only insofar as users did not expect GA for Firebase to "**save**"  
 19 **analytics data to their "Google Account,"**" in contravention of the description of WAA. Exactly—  
 20 that's not an interception, and it wasn't clear before now that this was Plaintiffs' only true theory.<sup>12</sup>

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21 <sup>12</sup> Of course, Plaintiffs could have said all this the last time around, instead of arguing that Google  
 22 improperly "conflates Google Analytics with Google's Firebase SDK," that "the two products are  
 23 not the same," that "[t]he scripts embedded in Firebase SDK allow Google to collect user data  
 24 directly from the user's phone," and that "this collection occurs whether or not an app developer  
 25 has enabled Google Analytics." ECF No. 71 at 5-6. Or they could have cleared it up at the hearing.  
 26 There, the Court noted that "secret scripts" could have meant "secret scripts, in the sense that  
 27 unbeknownst to the users and anybody else, that Google is, for its own purposes, retrieving this  
 28 data." MTD Tr. at 9:21-24. But Plaintiffs' counsel disagreed; when given the opportunity to clarify  
 whether Plaintiffs' had one theory or two, Plaintiffs' counsel responded: "I think our point is it's  
 really both" and that "I think our view is we do have claims under both scenarios." *Id.* at 36-37.  
 The lesson is this: it's easier to promise a claim-saving amendment in a brief or at a hearing than it  
 is to actually come up with one.

1 Finally, Plaintiffs miss the point of Google’s argument based on *Graham v. Noom, Inc.*, No.  
 2 20-CV-06903-LB, 2021 WL 1312765, at \*5 (N.D. Cal. Apr. 8, 2021). As *Graham* held, section 631  
 3 cannot prohibit developers from inviting third parties to record their communications, especially  
 4 when they have given notice of it to the user, because only a third party can intercept a  
 5 communication. Here, as this Court has already acknowledged, “Plaintiffs do not deny, for each app  
 6 at issue, reading and agreeing to a developer-generated disclosure—made at Google’s behest—  
 7 outlining the ‘use of the [GA for Firebase] Service . . . [to] collect[] and process[] data.’” MTD  
 8 Order at 7:25-27. Plaintiffs’ complaint is not that Google made a recording for the New York Times;  
 9 it is that Google also made a copy for itself, *after* the communication between the user and the app  
 10 developer was complete. Indeed, even the transmission of the recorded data to Google is done at the  
 11 app developer’s behest, and would have to be done anyway to serve solely the app developer’s  
 12 purposes. Why, then, do Plaintiffs allege that GA for Firebase runs afoul of section 631? Plaintiffs’  
 13 only answer is that Google’s *purpose* is dispositive. While that argument won the day for Plaintiffs  
 14 on their tort claims, there’s no authority for the proposition that Google’s subsequent use of data  
 15 that an app developer shared with it constitutes an interception under section 631; the analysis under  
 16 that statute turns on the technical question of whether there was an interception in the first place.

17 The cases *Graham* distinguishes were decided differently because the interception was  
 18 adequately alleged to happen simultaneously, and because the presence of the third party was  
 19 entirely unknown to the plaintiff. Here, Plaintiffs do not complain that Google records analytics data  
 20 for third-party app developers. Their complaint is that *after* the recording was made, and *after* the  
 21 recording was sent to Google for storage on behalf of the app developer, Google made a copy for  
 22 itself, exceeding the scope of the user’s consent. While the Court found that this alleged conduct  
 23 could constitute a violation of the scope of users’ consent, it does not constitute a CIPA Section 631  
 24 violation because section 631 is addressed solely to interceptions while in transit.

25 **III. CONCLUSION**

26 Google respectfully requests that the Court dismiss Plaintiffs’ first and second causes of  
 27 action for breach of contract and violation of California Penal Code § 631, with prejudice.  
 28

1 Dated: July 30, 2021

Respectfully submitted,

2 WILLKIE FARR & GALLAGHER LLP

3 By: /s/ Benedict Y. Hur \_\_\_\_\_

4 Benedict Y. Hur

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